



HMRC EVALUATION OF POWERS AND SAFEGUARDS

Issued 28 February 2020

ICAEW welcomes the opportunity to submit evidence to the HMRC evaluation of powers and safeguards which was announced by the Financial Secretary to the Treasury in a **written ministerial statement** on 22 July 2019.

ICAEW is a member of the Evaluation of Powers and Safeguards Forum and, along with other professional body stakeholders, has been contributing to its work since the forum was established. HMRC has provided a list of powers and a questionnaire to forum members to allow them to gather evidence from members. This representation is being submitted alongside the questionnaires that ICAEW members have completed. It draws out the key points from the completed questionnaires and includes some more general points based on feedback from members.

This response of 28 February 2020 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

© ICAEW 2020

All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact: taxfac@icaew.com

THE CONTEXT OF THE EVALUATION

1. The evaluation of powers and safeguards is one of six actions that the government agreed to take in response to the **House of Lords Economic Affairs Committee report: Treating Taxpayers Fairly**, published on 4 December 2018. The government rejected the recommendation to establish a new powers review covering both the cumulative effect of recent developments and what is needed for the future as tax administration moves to digital systems. The evaluation exercise is very limited in its scope and ICAEW would have welcomed a more wide-ranging review as recommended by the House of Lords.
2. The other actions agreed by the government were:
 - the establishment of a new Professional Standards Committee,
 - a response to the Adjudicator's report and a digital channel for complaints to the adjudicator,
 - support for taxpayers that need extra help,
 - an expanded range of performance and management information and
 - a review of taxpayer experience during compliance enquiries.

We understand that work on these actions is ongoing.

THE CONSULTATION PROCESS

3. We welcome the opportunity to contribute to this evaluation of HMRC's powers and the associated safeguards. Although the review was announced on 22 July 2019, detailed consultation on it did not start until much later. The time allowed in which to respond has therefore been truncated and has been far too short to allow professional bodies to engage more widely with our members, in particular reaching beyond the limited number of our members who specialise in investigations.
4. We believe that HMRC should have engaged much more widely with taxpayers and advisers; for example, directly with accounting and legal firms, with barristers and with businesses and individual taxpayers.
5. Given the very limited time available, those who have responded have inevitably focused on the powers which HMRC has identified as likely to be first priority.
6. The long list of powers and the questionnaire approach are not suitable as a way of engaging with businesses and general practitioners, who have been deterred from responding by the length of the material. Although we have sought views from these sectors of our membership, most of the feedback we have received is from tax investigations specialists, but we think nevertheless that the responses from this sector are likely to reflect the experiences in other sectors.
7. Many of the post-2012 powers have been introduced relatively recently and as yet there is little experience of them being used (eg, in a release dated 20 February 2020, **HMRC has indicated** that there are only nine live corporate criminal offences investigations with 21 under review). HMRC is unlikely to receive many comments on such powers, whatever their impact. It is, therefore, too early for a profession-wide evaluation of how HMRC is using some of these powers and we believe that a further review should be undertaken in due course.

THE RANGE OF HMRC'S POWERS

8. The long list of powers included in the review, together with those introduced prior to 2012, highlights that the vast array of powers has meant that this area has become far too complicated for taxpayers, advisers and HMRC to understand. Very few people would claim to have a good understanding of HMRC's powers and how they all interact and might be used. A common comment from members in recent years when HMRC has sought new powers is that HMRC already has sufficient powers to address the perceived problems, but is not using them. The efficacy of the current patchwork of HMRC's powers, both pre- and post-2012, needs a thorough overhaul and review, to see if they can be rationalised and

simplified. Powers, in particular the power to issue a penalty, need to be understood by taxpayers and their advisers if they are to act as a deterrent.

9. There needs to be a new consolidated Taxes Management Act where all these powers can be brought together in one place. This process was meant to have started once the powers review was complete, but instead all that has happened is that more powers have been loaded onto an already highly complicated patchwork of powers provisions. There has been an increasing trend for HMRC needing to issue guidance simply because legislation is unclear or inadequate. The government has found it necessary to introduce amending legislation to make good possible defects that have appeared in legislation eg, to ensure the validity of notices to file and penalty notices issued automatically by HMRC's systems.
10. The evaluation has not considered whether HMRC's powers are adequate in a digital environment. It might usefully have considered, for example, the status of information that HMRC obtains from a third party such as an employer or a deposit taker and uses to pre-populate a tax return or tax calculations.
11. HMRC is making increasing use of informal requests for information, prompts and additional non-statutory declarations in online returns and nudge letters. Whilst these have proved to be effective we are concerned that taxpayers may not recognise that informal requests do not have a statutory basis. We are also concerned that agents are on occasion required to complete declarations that are appropriate only to taxpayers.
12. ICAEW regularly receives feedback from practitioners about how HMRC conducts routine enquiries, including formal and informal requests for information which are very extensive and seem to go beyond what is reasonably required to check the tax position. Members also report that HMRC has changed its stance on reasonable excuse and what constitutes careless and deliberate behaviours. It is unfortunate that the powers that HMRC uses most routinely (eg, to require information, and to charge penalties for errors in returns) are excluded from the scope of any review simply because they were introduced pre-2012.
13. Members report increasing evidence of HMRC officers making assertions that there was some form of deliberate conduct so that either an extended time limit assessment may be made, a deliberate penalty may be pursued, or both. Often these assertions later prove to be unwarranted, with HMRC acting without first establishing the evidence which would support its position. The lack of clarity in the law assists neither HMRC nor taxpayers and often causes disputes to become unnecessarily protracted.
14. We support the recent **Budget representations made by the CIOT** that greater clarity should be brought to the meaning of 'deliberate' behaviour' in relation to tax matters. An assertion by HMRC of deliberate behaviour by a taxpayer should require, as the CIOT terms it, that "the person knew they were providing an inaccurate return or document to HMRC leading to an inaccurate self-assessment, or had deliberately chosen not to provide a return or document at all", and that this is evidenced by HMRC.
15. We have also seen a number of instances of HMRC apparently automatically taking the view that an omission is deliberate on the grounds of the value or quantum alone, even for relatively low level amounts, where other facts or mitigating factors in relation to the behaviour have not been properly considered or given sufficient weight.
16. Of the powers introduced since 2012, the ones that are of most concern to members are the requirement to correct and failure to correct penalties, HMRC's use of common reporting standards (CRS) data and accelerated payment and follower notices.
17. Members have reported that failure to correct penalties are often disproportionate to the behaviour demonstrated; a number of examples are included in the completed questionnaires.
18. Members have expressed concern about the lack of checks of CRS data against tax returns (including any entries in the 'white space') before letters are sent to taxpayers. The inclusion of a disclosure certificate with this initial letter is inappropriate in many cases. We have received reports of vulnerable taxpayers panicking on receipt of the opening letter and registering unnecessarily for the disclosure facility, despite there being no tax due, because

receipts from overseas were covered by deemed dividend tax credits or spare UK personal allowances, a fact that should have been apparent to the officer sending the letter.

19. Members have suggested that the impact of advanced payment notices (APNs) has been to prevent cases ever going to court. Those few cases that have gone to court have largely been decided in the taxpayer's favour, suggesting that the power has been used more unfairly than was promised to parliament. We have also heard reports that, because the criteria for their issue had not been met, HMRC has cancelled APNs without involving the tribunals, and the receipt by a taxpayer of a demand from HMRC debt management in respect of an APN of which the taxpayer was unaware because it had not been received. Both issues suggest that there were some administrative shortcomings within HMRC in the implementation of the power.